

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 23, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SILVIA ZARATE,

Plaintiff,

v.

RON EFFLAND, individually, and
LISA PADILLA, individually,

Defendants.

No. 1:23-CV-03140-MKD

ORDER DENYING PLAINTIFF'S
MOTIONS FOR APPOINTMENT OF
PRO BONO COUNSEL AND
DISMISSING ACTION WITH
PREJUDICE

ECF Nos. 21, 22, 23, 24

By Order entered January 26, 2024, the Court advised Plaintiff, who is proceeding in this case *pro se*, of the deficiencies of her First Amended Complaint and directed her to amend or voluntarily dismiss the Complaint within 60 days. ECF No. 20. Before the Court is Plaintiff's Second Amended Complaint, ECF No. 21; Second Amended Motion for Pro Bono Counsel, ECF No. 22; Third Amended Complaint, ECF No. 23; and Third Amended Motion for Pro Bono Counsel, ECF No. 24. The Court has reviewed the record and is fully informed. For the reasons discussed herein, the Court denies Plaintiff's Motions for Appointment of Pro Bono Counsel and dismisses the action.

ORDER- 1

1 ANALYSIS

2 **A. Second Amended Complaint**

3 Plaintiff filed the Second Amended Complaint on March 26, 2024, ECF No.
4 21, and then filed the Third Amended Complaint on March 27, 2024, ECF No. 23.
5 The complaints contain the same causes of action; the Third Amended Complaint
6 appears to have corrected some grammatical/spelling errors, and expanded
7 Plaintiff's allegations. *Compare* ECF Nos. 21, 23. As the Third Amended
8 Complaint encompasses the Second Amended Complaint, the Court finds the Third
9 Amended Complaint is the operative Complaint and addresses it below.

10 **B. Plaintiff's Allegations**

11 Plaintiff contends Defendants violated her Fourteenth and Fourth
12 Amendment rights during a 2020 investigation into allegations of child abuse made
13 against Plaintiff by her foster child, which resulted in Plaintiff losing her foster
14 care license and the ability to work with children in any state or governmental
15 agency. ECF No. 23 at 1-3, 7, 10-12. Plaintiff ultimately was able to obtain the
16 right to renew her foster home care license and is seeking to expunge her criminal
17 charge, to enable her to work with children again. *Id.* at 11-12.

18 Plaintiff is a former employee of Washington's Department of Children,
19 Youth, and Families (DCYF). *Id.* at 12. Defendant Padilla is an investigator for
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1 Washington state's Child Protective Services office, a division of DCYF. *Id.* at 2.
2 Defendant Effland works for Washington state's Division of Licensed Resources
3 Child Protective Services (DLR/CPS) headquarters. *Id.* at 3, 10. Plaintiff also
4 alleges multiple DCYF staff and CPS staff were involved, who are identified only
5 as "State Agents 1-10." *Id.* at 3.

6 Plaintiff had two foster children, Y.C. and Y.G., residing with her in 2020.
7 *Id.* Plaintiff's then spouse, Mr. Zarate-Lima, and her biological child, D.Z., also
8 resided with her. *Id.* at 6-7, 13. Plaintiff contends Y.C. and Y.G. made allegations
9 of abuse against Plaintiff and her then-spouse in January 2020. *Id.* at 7, 13. She
10 contends Y.C. and Y.G. were removed without a court order or protective custody
11 order. *Id.* at 8.

12 Plaintiff contends she was verbally notified of a founded disposition for
13 abuse against her in July 2020. *Id.* at 10. She received a letter confirming the
14 finding on August 24, 2020 and sent a letter asking for review of the finding on
15 August 28, 2020. *Id.* Plaintiff contends Defendant Padilla delayed mailing the
16 letter confirming the finding and her appeal rights because of "deliberate malice
17 intent." *Id.* at 27. Defendant Effland reviewed Plaintiff's letter and materials, and
18 stated he would not change the finding. *Id.* at 10, 28. Plaintiff appealed the
19 finding in September or October 2020. *Id.* at 10, 28. Plaintiff was formally
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1 charged with “Assault 2 of a child” on October 6, 2020. *Id.* Plaintiff contends
2 Defendant Padilla called the prosecutor’s office “at least 20 times to inquire
3 whether or not [Plaintiff] was going to be formally charged.” *Id.* at 24. Plaintiff
4 was terminated from her employment in December 2020. *Id.* at 28.

5 The criminal charge was dismissed on April 16, 2021, for lack of evidence.
6 *Id.* at 11. Plaintiff contends the abuse finding was reversed and the denial of
7 Plaintiff’s foster license was reversed. *Id.* Plaintiff contends the original denial of
8 her foster license “was a reprisal for Plaintiff proving the CPS investigation was
9 wrong.” *Id.* at 32.

10 Plaintiff contends Y.C. also made false allegations against the foster parent
11 she was placed with after Plaintiff, and Defendant Padilla intentionally withheld
12 this false allegation from her case notes and investigative assessment. *Id.* at 9, 31-
13 32. Plaintiff alleges Y.C. and Y.G. were placed with their father in February 2021,
14 and they then both confessed they had been afraid of disclosing the truth that there
15 was no abuse in Plaintiff’s home, in fear they might be removed from their
16 biological father’s care. *Id.* Plaintiff contends that despite Y.C. and Y.G.’s
17 confession, Defendants Padilla and Effland proceeded with the case against
18 Plaintiff. *Id.* Plaintiff alleges the evidence regarding Y.C.’s “lack of credibility”
19 was not shared with Plaintiff or her attorney until Amanda Cashion, the Foster
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1 First case manager, testified to it in a December 2021 CPS appeal hearing. *Id.*

2 Plaintiff contends Defendants are liable for compensatory and punitive
3 damages for their acts and omissions that were deliberately indifferent to Plaintiff's
4 rights, and which permanently injured Plaintiff. *Id.* at 35.

5 **C. 28 U.S.C. § 1915 Review**

6 When an individual seeks to proceed in forma pauperis, the Court is required
7 to review the complaint and dismiss such complaint, or portions of the complaint,
8 if it is “(i) frivolous or malicious; (ii) fails to state a claim upon which relief may
9 be granted; or (iii) seeks monetary relief from a defendant who is immune from
10 such relief.” 28 U.S.C. § 1915(e)(2); *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir.
11 1981). A plaintiff's claim is frivolous “when the facts alleged rise to the level of
12 the irrational or the wholly incredible, whether or not there are judicially noticeable
13 facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 32-33
14 (1992).

15 A claim is legally frivolous when it lacks an arguable basis either in law or
16 in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), *superseded by statute on*
17 *other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
18 (en banc); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984).

19 Therefore, the Court may dismiss a claim as frivolous where it is “based on an
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1 indisputably meritless legal theory” or where the “factual contentions are clearly
2 baseless.” *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional
3 claim has an arguable basis in law and fact. *See Jackson v. Arizona*, 885 F.2d 639,
4 640 (9th Cir. 1989), *superseded by statute on other grounds*, *Lopez*, 203 F.3d at
5 1130-31; *Franklin*, 745 F.2d at 1227.

6 The facts alleged in a complaint are to be taken as true and must “plausibly
7 give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).
8 Mere legal conclusions “are not entitled to the assumption of truth.” *Id.* The
9 complaint must contain more than “a formulaic recitation of the elements of a
10 cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The
11 complaint must plead “enough facts to state a claim to relief that is plausible on its
12 face.” *Id.* at 570.

13 As a general rule, an amended complaint supersedes the original complaint
14 and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927
15 (9th Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint
16 which are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814
17 F.2d 565, 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811,
18 814 (9th Cir. 1981)), overruled in part by *Lacey*, 693 F.3d at 928 (any claims
19 voluntarily dismissed are considered to be waived if not replied).

1 A court must dismiss the case at any time if it fails to state a claim on which
2 relief may be granted or seeks relief against a defendant who is immune from such
3 relief. 28 U.S.C. § 1915(e)(2)(B). Liberally construing the Third Amended
4 Complaint in the light most favorable to Plaintiff, the Court finds that the amended
5 complaint fails to cure the deficiencies of the Complaint and does not state a claim
6 upon which relief may be granted.

7 *1. Section 1983 Claim*

8 Plaintiff contends Defendants violated her Fourteenth and Fourth Amendment
9 rights. ECF No. 18 at 35-52. Section 1983 requires a claimant to prove that (1) a
10 person acting under color of state law (2) committed an act that deprived the
11 claimant of some right, privilege, or immunity protected by the Constitution or laws
12 of the United States. *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). A
13 person deprives another “of a constitutional right, within the meaning of section
14 1983, if he does an affirmative act, participates in another’s affirmative acts, or
15 omits to perform an act which he is legally required to do that *causes* the deprivation
16 of which [the plaintiff complains].” *Redman v. Cty. of San Diego*, 942 F.2d 1435,
17 1439 (9th Cir. 1991) (emphasis and brackets in the original), *abrogated in part on*
18 *other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994).

1 A complaint must set forth the specific facts upon which the plaintiff relies
2 in claiming the liability of each defendant. *Ivey v. Bd. of Regents of Univ. of*
3 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Although the standard to evaluate a
4 motion to dismiss is liberal, particularly when the action has been filed *pro se*, a
5 liberal interpretation of a civil rights complaint may not supply essential elements
6 of a claim that the plaintiff initially failed to plead. *Id.* Thus, to withstand
7 dismissal on a § 1983 claim, Plaintiff must set forth facts demonstrating how each
8 Defendant caused or personally participated in causing a deprivation of Plaintiff's
9 protected rights. *Arnold v. Int'l Bus. Machines Corp.*, 637 F.2d 1350, 1355 (9th
10 Cir. 1981); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "If there is no
11 constitutional violation, the inquiry ends and the [defendant] is entitled to qualified
12 immunity." *Ioane v. Hodges*, 939 F.3d 945, 950 (9th Cir. 2018).

13 a. Statute of Limitations

14 Plaintiff's Fourteenth Amendment claim is barred by the statute of
15 limitations. The Court set forth an analysis of this issue in the January 2024 Order.
16 ECF No. 20 at 6-8. Plaintiff's amended complaint does not cure the defect.
17 Section 1983 does not contain a statute of limitations; rather, state law governs the
18 timeliness of a Section 1983 claim. *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022).
19 As such, a Section 1983 claim must commence within the statute of limitations for
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1 personal injury actions in the state where the cause of action arose. *Wallace v.*
2 *Kato*, 549 U.S. 384, 387 (2007). In Washington, a personal injury action expires at
3 three years. RCW § 4.16.080(2); *see also Bagley v. CMC Real Est. Corp.*, 923
4 F.2d 758, 760 (9th Cir. 1991).

5 Whereas state law sets the outer limits of the statute of limitations, federal
6 law determines when a statute of limitations begins to run. *Lukovsky v. City &*
7 *Cnty. of S.F.*, 535 F.3d 1044, 1048 (9th Cir. 2008). This date is synonymous with
8 the “accrual” of a Section 1983 claim, meaning the date “the plaintiff knows or has
9 reason to know of the injury that is the basis of the action.” *Pouncil v. Tilton*, 704
10 F.3d 568, 573-74 (9th Cir. 2012). Even if the plaintiff does not know the full
11 extent of the injury, the cause of action accrues. *Wallace*, 549 U.S. at 391.

12 Plaintiff again alleges that the events giving rise to her claims began on
13 January 21, 2020 when the investigation into the child abuse allegations was
14 launched against Plaintiff. ECF No. 23 at 14. Plaintiff was placed in an alternative
15 assignment by her employer in January 2020. *Id.* at 19. Plaintiff was informed she
16 would be charged in March 2020. *Id.* at 24. In April 2020, Plaintiff applied for her
17 foster license renewal and was told the application was on hold, pending the CPS
18 investigation. *Id.* at 25. Plaintiff was notified of the disposition of the child abuse
19 investigation in July 2020 and received a letter confirming the finding in August
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1 2020. *Id.* at 26-27. Plaintiff's foster license application was also denied in August
2 2020. *Id.* at 27. Defendant Effland informed Plaintiff he was upholding the
3 disposition on September 17, 2020. *Id.*

4 Plaintiff was thus aware of the CPS investigation and the criminal charges,
5 and their impacts on her employment and foster license between January and
6 August 2020. However, Plaintiff did not file this claim until September 18, 2023,
7 more than three years later. Plaintiff presents no basis to support equitable tolling
8 for her claims.

9 Plaintiff contends the state of limitation period did not begin to run until her
10 injury on October 12, 2020, when she lost her foster care license. *Id.* at 40.

11 However, all the events leading up the license non-renewal occurred by August
12 2020, and Plaintiff was notified of her application denial for her foster license in
13 August 2020, as discussed *supra*. Plaintiff contends she did not receive the formal
14 letters until September 25, 2020, but Plaintiff already knew of the injury that is the
15 basis for this action in August 2020. Plaintiff did not file her Complaint with this
16 Court until more than three years later.

17 Plaintiff also contends the statute of limitations should be equitably tolled.
18 *Id.* at 38-40. In Washington, equitable tolling is allowed when 1) justice requires;
19 2) the plaintiff demonstrates their own diligence in filing; 3) plaintiff demonstrates
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1 bad faith, deception, or false assurances by the defendant; and 4) the application of
2 equitable tolling is consistent with the purpose of the statute providing the cause of
3 action and the purpose of the statute of limitations. *Fowler v. Guerin*, 200 Wash.
4 2d 110, 119 (2022) (citations omitted).

5 Here, Plaintiff contends she diligently sought to defend against the child
6 abuse allegations and Defendants' bad faith and deception interfered with
7 Plaintiff's diligent efforts by prolonging the prosecution process. ECF No. 23 at
8 40. However, Plaintiff contends Defendants failed to follow policies and
9 procedures at every stage of the investigation and criminal case, and Plaintiff knew
10 of her alleged injuries as of August 2020. While Plaintiff contends Defendants
11 failed to timely disclose information, such as the foster children later recanting the
12 allegations of abuse discussed *supra*, these alleged actions did not impact
13 Plaintiff's knowledge that she had already been allegedly injured as of August
14 2020. Plaintiff reportedly became aware of the allegedly withheld information in
15 December 2021, but still did not file an action with this Court until September
16 2023. Plaintiff has not demonstrated that her delay in filing the claim was
17 attributable to Defendants' actions. *See Fowler*, 200 Wash. at 122. As Plaintiff
18 has not met her burden in demonstrating all four elements are met, the Court finds
19 equitable tolling is not appropriate in this case. *See Millay v. Cam*, 135 Wash. 2d
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1 193, 206 (1998). Even if the claim was not time-barred, Plaintiff has failed to state
2 a claim for the reasons discussed herein.

3 b. Fabricated evidence

4 Plaintiff first contends Defendants violated her rights by fabricating
5 evidence. ECF No. 18 at 20-21. “To prevail on a § 1983 claim of deliberate
6 fabrication, a plaintiff must prove that (1) the defendant official deliberately
7 fabricated evidence and (2) the deliberate fabrication caused the plaintiff’s
8 deprivation of liberty.” *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017)
9 (citations omitted). A plaintiff must first point to evidence that demonstrates the
10 government deliberately fabricated evidence; this can be done by either 1) showing
11 actual misrepresentations, such as deliberately falsified statements; 2) showing
12 defendant continued their investigation of plaintiff although they knew or should
13 have known plaintiff was innocent; or 3) showing defendant used investigative
14 techniques that were so abusive and coercive that they knew or should have known
15 those techniques would yield false information.” *Patterson v. Miller*, 451 F. Supp.
16 3d 1125, 1145 (D. Ariz. 2020), *aff’d*, No. 20-15860, 2021 WL 3743863 (9th Cir.
17 Aug. 24, 2021).

18 Here, Plaintiff does not point to any evidence of actual misrepresentations,
19 nor abusive or coercive investigative techniques. Plaintiff alleges Defendant
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1 Padilla “failed to properly conduct an investigation.” ECF No. 23 at 36. Plaintiff
2 contends Defendant Padilla left information out of her report and failed to contact
3 collateral contacts. *Id.* These allegations mirror Plaintiff’s prior allegations she
4 contended were *Brady* violations. *See* ECF No. 18 at 20-22. Plaintiff contends
5 Defendants shared “inaccurate, misleading, and incomplete” information but does
6 not contend that any defendant deliberately fabricated evidence. ECF No. 23 at 39.

7 While Plaintiff contends Defendants continued the investigation against her,
8 when they knew or should have known Plaintiff was innocent, Plaintiff has not
9 established causation. *See Spencer*, 857 F.3d at 798 (fabricated evidence does not
10 give rise to a claim if the plaintiff cannot establish the fabrication injured her).
11 Plaintiff’s alleged injury is the loss of her foster license and her job. However,
12 Plaintiff was transferred to a different job in January 2020 and Plaintiff’s foster
13 license renewal was denied in August 2020. ECF No. 23 at 19, 27. Plaintiff was
14 terminated from her employment in December 2020. *Id.* at 28. Plaintiff contends
15 Y.C. and Y.G. recanted in February 2021. *Id.* While Plaintiff contends
16 Defendants continued the investigation against her after knowing Y.C. and Y.G.
17 recanted, Plaintiff’s alleged injuries had already occurred prior to the recanting. At
18 the time of Defendant Padilla’s recommendation of the abuse finding, Y.C. and
19 Y.G. had still maintained their allegations of abuse. *Id.* at 26. Similarly, a finding
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1 of probable cause of child abuse against Plaintiff occurred in September 2020,
2 prior to Y.C. and Y.G. recanting. *Id.* at 27.

3 Plaintiff contends Defendants also should have known she was innocent,
4 even before Y.C. and Y.G. recanted, because the only evidence of abuse was the
5 “Statements of an eight year old with documented behavioral issues,” who later
6 made false allegations against another foster parent. *Id.* at 30. However, Plaintiff
7 concedes “other professionals credibly testified about those statements,” although
8 they were only repeating what the child told them. *Id.* The story was also
9 corroborated by the child’s sister. *Id.* Although Plaintiff contends Defendants
10 knew or should have known she was innocent because the investigation was based
11 on Y.C.’s unreliable hearsay, Defendants at the time had statements from both
12 Y.C. and Y.G., and multiple adults who repeated the children’s allegations.
13 Plaintiff has not demonstrated that Defendants knew or should have known she
14 was innocent when they continued the investigation in 2020, when the alleged
15 injuries occurred. As such, Plaintiff has not established causation and she has
16 failed to state a deliberate fabrication of evidence claim.

17 Lastly, Defendants appear to be entitled to qualified immunity. Child
18 protective agency’s employees’ actions that are prosecutorial or judicial in nature
19 warrant absolute immunity. *Meyers v. Contra Costa County Department of Social*
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1 *Services*, 812 F.2d 1154 (9th Cir. 1987); *Miller v. Gammie*, 335 F.3d 889, 900 (9th
2 Cir. 2003) (en banc), *overruled on other grounds*, *Sanchez v. Mayorkas*, 141 S. Ct.
3 1809 (2021). The social workers' actions that are discretionary decisions or
4 recommendations that are not functionally similar to prosecutorial or judicial
5 decisions are entitled to only qualified, rather than absolute, immunity. *Miller*, 335
6 F.3d at 898; *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir.
7 2010). Social workers are not entitled to absolute immunity from claims that they
8 fabricated evidence or made false statements in a dependency petition affidavit that
9 they signed under penalty of perjury. *Costanich v. Dep't of Soc. & Health Servs.*,
10 627 F.3d 1101, 1109 (9th Cir. 2010).

11 In applying the qualified immunity doctrine, the Court must consider 1)
12 whether the facts alleged show Defendants' conduct violated a constitutional right;
13 and 2) whether the right was clearly established. *Id.* at 1110 (citing *Saucier v.*
14 *Katz*, 533 U.S. 194, 201 (2001)). As Plaintiff has not demonstrated Defendants
15 violated a constitutional right, Defendants are entitled to qualified immunity.
16 Plaintiff has failed to state a Fourteenth Amendment claim.

17 c. Fourth Amendment

18 Plaintiff contends Defendants engaged in malicious prosecution. ECF No.
19 23 at 41-52. To state a Fourth Amendment malicious prosecution claim, the
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1 plaintiff must establish: 1) a criminal prosecution was initiated or continued against
2 the plaintiff, and the defendants made, influenced, or participated in the decision to
3 prosecute; 2) there was no probable cause for the prosecution; 3) the proceedings
4 were instituted or continued through malice; 4) the plaintiff suffered a deprivation
5 of liberty apart from the initial seizure; and 5) the criminal proceedings were
6 resolved in the plaintiff's favor. *Mills v. Barnard*, 869 F.3d 473, 480 (6th Cir.
7 2017); *Clark v. Baines*, 84 P.3d 245, 911 (Wash. 2004); *Singer v. Fulton County*
8 *Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995); *Awabdy v. City of Adelanto*, 368 F.3d
9 1062, 1066 (9th Cir. 2004).

10 As to the first element, Plaintiff contends a criminal prosecution was
11 initiated against her and alleges Defendants were involved in her prosecution. ECF
12 No. 23 at 42-43. Plaintiff contends Defendant Padilla and other DCYF agents
13 "requested and or pushed for" the case to remain and advocated for Plaintiff to be
14 charged. *Id.* at 42-44. Simply reporting the allegation of child abuse to the police
15 and providing facts related to the crime is insufficient to establish involvement.
16 *Nieves v. Cnty of Monroe*, 761 F. Supp. 2d 48, 51-52 (W.D.N.Y. 2011). Even if
17 the Court found Defendants advocating for Plaintiff to be charged was sufficient to
18 satisfy the first element, the remaining elements fail.

1 As to the second element, Plaintiff contends there was never probable cause,
2 ECF No. 23 at 44, however there is a rebuttable presumption that a prosecutor
3 exercises independent judgment in deciding to file criminal charges, *Awabdy*, 368
4 F.3d at 1067. Plaintiff alleges the prosecutor's decision to charge Plaintiff was
5 based on the Defendants' faulty child abuse investigative report. ECF No. 23 at
6 46. However, Plaintiff contends the report was faulty because Defendants did not
7 engage in a comprehensive enough investigation. Plaintiff does not allege there
8 was fraud, corruption, perjury, fabricated evidence, or other wrongful conduct
9 undertaken in bad faith. *See Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir.
10 1986) (plaintiff failed to overcome the presumption the prosecutor exercised
11 independent judgment because he produced no evidence the prosecutor was
12 subjected to unreasonable pressure, nor that the defendants knowingly withheld
13 relevant information with the intent to harm plaintiff, nor that the defendants
14 knowingly supplied false information); *Barlow v. Ground*, 943 F.2d 1132 (9th Cir.
15 1991) (plaintiff rebutted the presumption when the prosecutor relied solely on
16 arresting officers' reports, which omitted critical information, and independent
17 witness corroborate some of plaintiff's version of events, which conflicted with the
18 officers' version).

1 Here, the prosecutor had statements from both Y.C. and Y.G., as well as
2 Defendants' reports, when Plaintiff was charged. Only when a reasonable attorney
3 would find the action was completely without merit can a court authorize a
4 malicious prosecution action to proceed. *Rashidi v. Albright*, 818 F. Supp. 1354,
5 1359 (D. Nev. 1993), *aff'd*, 39 F.3d 1188 (9th Cir. 1994). Although the charges
6 were later dropped, Plaintiff has not rebutted the presumption that the prosecutor
7 exercised independent judgment at the time of charging, despite the information
8 Plaintiff alleges was missing from the reports. Even if a reasonable attorney knew
9 Y.C. and Y.G. made other false allegations against foster parents, a reasonable
10 attorney still could have found the case had merit, given the statements of abuse
11 from both Y.C. and Y.G., and statements from adults who reported the children's'
12 allegations. Plaintiff's claim fails to demonstrate the second element.

13 As to the third element, Plaintiff contends Defendants instituted or continued
14 the investigation with malice. ECF No. 23 at 47. However, Plaintiff states Officer
15 Salinas demonstrated malice; he is not a party to this case. *Id.* Further, Plaintiff
16 contends Defendants continued to pursue the abuse disposition against her even
17 after the criminal charges were dropped. *Id.* at 48. However, the presence of
18 probable cause requires the conclusion that malice is nonexistent. *Rashidi*, 818
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1 F.Supp. at 1360 (citing *Walsh v. Bronson*, 245 Cal.Rptr. 888, 894 (1988)). Thus,
2 Plaintiff's claim fails to demonstrate the third element.

3 As Plaintiff has not established the second nor third elements, the Court need
4 not reach the fourth element. Plaintiff has failed to state a malicious prosecution
5 claim.

6 **D. No Further Opportunity to Amend**

7 Plaintiff has amended her complaint three times. Unless it is clear that an
8 amendment would be futile, a *pro se* litigant must be given the opportunity to
9 amend her complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446,
10 1448 (9th Cir. 1987), *superseded by statute on other grounds*, 28 U.S.C. §
11 1915(e)(2), *as stated in Aktar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).
12 Plaintiff was notified in the January 2024 Order that the next amended complaint
13 would be Plaintiff's final opportunity to amend. ECF No. 20. As Plaintiff has
14 already amended her complaint multiple times and has not been able to cure the
15 deficiencies in the complaint, the Court finds further amendments would be futile.

16 **E. Pro Bono Counsel**

17 Plaintiff filed a Second Amended Motion for Appointment of Pro Bono
18 Counsel, ECF No. 22, and a Third Amended Motion for Appointment of Pro Bono
19 Counsel, ECF No. 24. The two motions appear to be nearly identical, with the
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1 third motion correcting spelling errors and adding information about a FOIA
2 request. As such, the Court addresses the motions together.

3 This Court can designate counsel under 28 U.S.C. §1915(e)(1) only under
4 exceptional circumstances. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir.
5 2009) (setting forth standard of review and requirement of “exceptional
6 circumstances” for appointment of counsel). Determining whether exceptional
7 circumstances exist requires evaluating “the likelihood of success on the merits”
8 and Plaintiff’s ability “to articulate his claims pro se in light of the complexity of
9 the legal issues involved.” *Id.* (citation omitted).

10 For the reasons discussed *supra*, Plaintiff has articulated the challenges she
11 has faced with Defendants, however, Plaintiff has not demonstrated that
12 Defendants actions rise to the level of a constitutional violation. Plaintiff has
13 failed to state a claim after multiple amendments, and the Court finds that Plaintiff
14 is unlikely to succeed on the merits of the case even if pro bono counsel was
15 appointed to assist Plaintiff with the claim. As such, Plaintiff’s motions for
16 appointment of pro bono counsel are denied.

17 Accordingly, **IT IS HEREBY ORDERED.**

18 1. Plaintiff’s Motions for Appointment of Pro Bono Counsel, **ECF Nos. 22,**
19 **24, are DENIED.**

1 2. This action is **DISMISSED with prejudice**.

2 3. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of
3 this Order would not be taken in good faith and would lack any arguable basis in
4 law or fact.

5 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order,
6 **enter judgment**, provide copies to *pro se* Plaintiff and counsel, and **CLOSE** the
7 file.

8 DATED April 23, 2024.

9 s/Mary K. Dimke
10 MARY K. DIMKE
 UNITED STATES DISTRICT JUDGE